



IT IS ORDERED as set forth below:

Date: November 15, 2007

James E. Massey

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

CASE NO. 07-72742

Calvin Lewis Erby,

CHAPTER 13

Debtor.

JUDGE MASSEY

ORDER DENYING MOTION TO REOPEN CASE

The Court dismissed this case in an Order entered on September 14, 2007 granting the motion to dismiss filed by the Chapter 13 Trustee on August 15, 2007 and grounded on the failure of Debtor to file a certificate showing that he obtained credit counseling. (On September 4, 2007, the Debtor filed a credit counseling certificate showing that he had obtained credit counseling in April 2007, within 180 days of the filing of the case, but this filing was not brought to the Court's attention. Mr. Erby did not attend the hearing on the motion held on September 5, 2007.)

Debtor moves to reopen the case on the ground that HSBC Mortgage Services, Inc. ("HSBC"), a creditor secured by Debtor's residence, ignored the automatic stay and foreclosed on

Debtor's residence after the filing of this case. The motion to reopen is without merit because it fails to show that Debtor could propose a confirmable plan and perform it and because its premise that HSBC violated the automatic stay is false.

Mr. Erby filed this case on August 7, 2007, his third case pending within one year. He was the debtor in case no. 06-74184, a Chapter 13 case, which was filed on November 6, 2006 and dismissed on January 25, 2007 on the motion of the Chapter 13 Trustee. Mr. Erby was the debtor in case no. 07-65273, a Chapter 7 case, filed on April 2, 2007 and dismissed on June 13, 2007. That case was dismissed pursuant to section 707(a) for cause, which was his failure to attend the meeting of creditors. Mr. Erby represented himself in the prior two cases and in the present case until he filed the motion to reopen. In all three cases, he failed to file schedules, a statement of financial affairs and other documents required by section 521(a) of the Bankruptcy Code, even though the Clerk notified him to file those documents within 15 days of the petition date.

"To grant a motion to reopen '[t]he moving party must demonstrate that there is a compelling cause. There is no cause if reopening would serve no purpose.' *Horizon Aviation of Va., Inc. v. Alexander*, 296 B.R. 380, 382 (E.D. Va.2003) (citing *In re Carberry*, 186 B.R. at 403)". *In re Parson*, 2007 WL 3306678, *7 (Bankr. E.D.Va. 2007). Thus, a motion to reopen should allege facts showing that some legitimate purpose would be served by reopening the case. It would be futile to reopen, on the debtor's motion, a Chapter 13 case dismissed prior to confirmation if the debtor is unable to show some basis for believing that a plan could be confirmed and performed. Here, Mr. Erby has not alleged any facts to show that he is capable of getting a plan confirmed and performing a plan. His failure to provide any information about his

financial condition in three cases, despite having had a year to do so, creates an inference that this case was filed in bad faith. Failing to allege a single fact to show that reopening this case would not be futile, in light of that inference, warrants its denial.

Notwithstanding that the motion to reopen is deficient on its face, the Court will address Mr. Erby's contention that HSBC violated the automatic stay in order to bring finality to the question of whether the foreclosure sale was valid. Otherwise, Mr. Erby could file a second motion to reopen the case or a fourth case to revisit the issue, resulting in new and unnecessary costs.

HSBC contends that because Debtor had two prior cases pending during the year preceding the filing of this case, no automatic stay came into effect when this case was filed.¹

Section 362(c)(4)(i) states:

[I]f a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case[.]

Debtor contends that the Chapter 7 case filed by Debtor does not count in determining whether two prior cases were pending within the year preceding the filing of the current case.

Debtor quotes the following language from the Collier treatise in support of his position:

It [Section 362(c)(4)] was likely intended to provide, as under section 362(c)(3), that the subsection's stay limitation does not apply in a case filed under a chapter other than chapter 7 following the dismissal of a prior chapter 7 case under section 707(b).

COLLIER ON BANKRUPTCY § 362.06[4].

¹ On November 13, 2007, the Court held a telephone conference with Debtor's counsel and counsel for HSBC in a state court eviction proceeding during which HSBC's counsel argued that the automatic stay was not in effect.

This commentary flatly contradicts Debtor's contention that a prior Chapter 7 case is not counted in applying section 362(c)(4).

The phrase "other than a case refiled under section 707(b)" is not a model of clarity, though as will be shown, its meaning is nonetheless clear. The potential for confusion arises because cases are not filed or refiled *under* section 707(b); rather, that section provides for dismissal of Chapter 7 cases deemed or found to be an abuse of Chapter 7.

One substantial clue to the meaning of the phrase is the reference to section 707(b) in section 362(c)(3)(A), which states:

[I]f a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) --

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case[.]

In section 362(c)(3), the operative words expressing an exception to the applicability of that section are "other than a case refiled *under a chapter other than chapter 7 after dismissal* under section 707(b)." The italicized words were left out of section 362(c)(4), which surely was an oversight. The Court can think of no argument for interpreting the phrase "other than a case refiled under section 707(b)" used in subsection (c)(4) differently from the phrase "other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)" used in subsection (c)(3).

The phrase "other than a case refiled under section 707(b)" was plainly intended to be an exception to the general rule blocking the creation of an automatic stay. It modifies the opening

words of the subsection to exclude the current case from the operation of section 364(c)(4) if the current case was “refiled under section 707(b).”

Even without reference to subsection (c)(3), the meaning of subsection (c)(4) is clear. Section 707(b) prescribes the so-called means test that creates a presumption of abuse of Chapter 7 if a debtor’s net income, as computed in accordance with that section, is greater than a stated minimum amount, thereby showing the debtor is able to repay at least a portion of scheduled debt. Dismissal of a Chapter 7 case pursuant to section 707(b) leaves the debtor with no remedy in bankruptcy except in a Chapter 11, 12 or 13 case, assuming that the debtor’s financial condition thereafter remains the same or improves. Such a dismissal aborts the case at its inception, so that the filing of a subsequent case is in a sense a “refiling” of the case. Seen in this light, the phrase “other than a case refiled under section 707(b)” is a somewhat clumsy way of referring to the current Chapter 11, 12 or 13 case that was “refiled” under or due to the constraints of section 707(b), that is, following dismissal of a case pursuant to section 707(b), which is what section 362(c)(3) more plainly states. Mr. Erby’s Chapter 7 case was not evaluated under section 707(b) because he failed to file the means test form that section 707(b)(2)(C) required him to file.

Two cases pending in the year prior to the filing of a new case and the new case itself constitute three strikes against the debtor, preventing the automatic stay from arising merely by filing the new case, except where the new case is filed under Chapter 11, 12 or 13 following the dismissal of a prior Chapter 7 case pursuant to section 707(b). If the exception is satisfied, the new case is like a foul ball after two strikes in a baseball game – the new case does not count as a

strike. Section 362(c)(4) neither states nor implies that a prior Chapter 7 case does not count in computing the number of pending cases during the year preceding the filing of a new case.

Mr. Erby's first Chapter 13 case and his Chapter 7 case were strikes because they were dismissed less than a year before he filed this case. The current case is also a strike because the Chapter 7 case was dismissed under section 707(a) and not section 707(b). Thus, Mr. Erby has three strikes, and he is out.

The obvious purpose of the section 364(c)(4) is to weed out each individual debtor who is very likely to be abusing the bankruptcy process by filing a new case after having had two cases pending within the preceding year. Such a debtor has the opportunity to have the stay imposed by proving good faith in filing the new case but can do so only by clear and convincing evidence. 11 U.S.C. § 362(c)(4)(B). A motion to impose the stay must be filed within 30 days of the petition date, however. *Id.* Mr. Erby missed the 30-day deadline.

For these reasons, the foreclosure that took place following the filing of this case was not barred by the automatic stay. The game is over.

Accordingly, Debtor's motion to reopen this case is DENIED. The Clerk is directed to serve a copy of this Order on Debtor, Debtor's counsel, the Chapter 13 Trustee and counsel for HSBC Mortgage Services, Inc.

END OF ORDER